

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 23289

SUGAR CREEK CHARTER SCHOOL,)
INC., et al,)
)
Plaintiffs,)
)
v.)
)
STATE OF NORTH CAROLINA, et al.)
)
Defendants.)

**REPLY BRIEF
IN SUPPORT OF THE STATE'S
MOTION TO DISMISS**

INTRODUCTION

In this case, Plaintiffs claim that the General Assembly does not have the right to dictate the terms of a charter through which it confers benefits upon a private corporation. Plaintiffs' claim has no merit. Under North Carolina law, a private entity that accepts benefits under a sovereign charter cannot force the State to confer upon it more rights or benefits than the State is willing to give. Furthermore, a court has no authority to amend the terms of a sovereign charter to force the State to transfer rights to a private corporation that the State has refused to confer.

Plaintiffs' entire brief in opposition to Defendants' Motions to Dismiss is founded on legal fallacies. The most basic of these is the notion that students of Uniform Public Schools are a "favored class" while charter school students are a "disfavored class." That argument is nonsense. *Every single student who elects to attend a charter school and accept the particular educational benefits that charter school may provide does so voluntarily. Every single student enrolled in a charter school who wishes to transfer back to a Uniform Public School and accept the particular educational benefits that system provides may do so any time he or she wishes.* The fact that the State treats a private corporation that operates a charter school (a school of choice) differently than

it treats the local boards of education that are constitutionally obligated to operate a school system does not violate any rights of a private corporation that accepted the terms of the charter. A private corporation cannot have its cake and eat it too by accepting taxpayer money under the terms of its charter from the State yet simultaneously demanding additional rights, such as local capital funding, that the State has elected to reserve for the benefit of schools in the Uniform System.

Plaintiffs' attempt to classify charter schools as a component of the Uniform System is akin to forcing a round peg into a square hole. Charter schools receive different funding than Uniform Public Schools because the underlying premise of the charter is to provide a finite amount of public funding to a private corporation which promises to operate a school as an educational experiment within the limitations decreed by the General Assembly. Plaintiffs' complaint about the differences in the respective sets of laws governing charter schools and Uniform Public Schools ignores the fact that these corporations were granted charters precisely because they agreed to operate their schools differently.

When the State issues a charter to a private corporation under the Charter School Act, it is, in essence, issuing the corporation a license to operate a school. Like any license, the private corporation applies for the charter and the State Board of Education issues that charter subject to specific conditions. In exchange for the right to receive a certain amount of taxpayer money, prescribed by statute, which it pledges to use to operate a school, the corporate licensee agrees to abide by certain conditions. Once it has issued the charter, the State undertakes the obligation to fund a portion of the corporation's operating expenses for the school from certain specified categories of money. Capital funding is not included. The corporation's decision to apply for and accept the terms of the license is wholly voluntary. If the corporation does not want to accept the

applicable conditions or the limits on State and local funding, the corporation is free to relinquish the charter and continue to operate a private school or to operate no school at all.

This lawsuit, however, is an attempt by corporations who run charter schools to demand additional money under these licenses, money that the State Board of Education has not been authorized by the General Assembly to pay. The heart of Plaintiffs' argument is that a private corporation that has persuaded the State to grant it a charter (something that the State was not required to do) has, in addition to the rights spelled out in the charter, somehow also acquired a constitutional right to have certain terms inserted into the charter – namely, the right to additional taxpayer funding. Such an argument turns basic legal principles on their head. There is simply no constitutional component to licenses issued by the State Board of Education to a private corporation. The State is free to make its own decision both whether to issue the license in a particular case and, if so, what the terms and scope of the license will be.

Stripped of its veneer, this lawsuit is nothing more than an effort to persuade this Court to act as a super-legislature and to judicially “overrule” the General Assembly’s policy decision that the private corporations operating charter schools are not eligible to receive capital funding. Obviously, this is not a proper role for this Court.

ARGUMENT

While Plaintiffs have filed an Amended Complaint, none of their new allegations change the legal invalidity of their claims. For the reasons set out herein and in the State’s original brief, the State submits that dismissal of this action is proper.

I. BECAUSE PLAINTIFF'S AMENDED COMPLAINT RAISES PURELY LEGAL ISSUES, RESOLUTION BY MEANS OF A MOTION TO DISMISS IS APPROPRIATE.

As an initial matter, Plaintiffs' brief appears to suggest that the arguments asserted by Defendants should not be considered on a motion to dismiss. This argument is incorrect.

The Court of Appeals has made clear that "[a] claim may be dismissed under Rule 12(b)(6) if there is no law to support the claim . . . *To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule.*" *N. C. Eastern Municipal Power Agency v. Wake County*, 100 N.C. App. 693, 695, 398 S.E.2d 486, 487, (1990) (emphasis added).

Based on both the Amended Complaint and Plaintiffs' brief, there are only two issues in this case: (1) Whether the Charter School Statutes render charter schools eligible to receive capital funding from counties; and (2) If not, whether their ineligibility to receive such funding is constitutional. Both issues are purely legal rather than factual.

While Plaintiffs' brief suggests that their assertions in the Amended Complaint regarding these issues should be deemed true for purposes of a motion under Rule 12(b)(6), this assertion is incorrect because their assertions are legal rather than factual. It is well-settled that for purposes of a Rule 12(b)(6) motion to dismiss, "conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). *See Affordable Care, Inc. v. N. C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002) ("[I]t is elementary that the trial court must draw its own legal conclusions" from the facts pled in the complaint "and that it may draw conclusions which may differ from those advocated by plaintiffs.").

Plaintiffs' brief does not even attempt to argue that there are unresolved questions of fact that preclude the Court from addressing the merits of Defendants' legal arguments. Nor could Plaintiffs

credibly make such a contention. How the Charter School Statutes should be interpreted and whether the General Assembly is constitutionally required to fund charter schools in precisely the same way that it funds Uniform Public Schools¹ are quintessential examples of legal questions appropriate for ruling on a Rule 12(b)(6) motion.

II. THE GENERAL ASSEMBLY HAS NOT AUTHORIZED CHARTER SCHOOLS TO RECEIVE CAPITAL FUNDING.

A. BASIC PRINCIPLES OF STATUTORY CONSTRUCTION MANDATE THE CONCLUSION THAT THERE IS NO STATUTORY BASIS FOR CHARTER SCHOOLS TO RECEIVE CAPITAL FUNDING.

At the outset, it is important to understand the magnitude of what Plaintiffs are seeking. In the fourteen years since the charter school legislation was adopted, the private corporations operating charter schools have never been deemed eligible for capital funding from counties. Plaintiffs, through this lawsuit, seek to radically alter the allocation of public education money in North Carolina and to do so in a way that is directly contrary to the clearly expressed intent of the General Assembly.

Moreover, throughout the entire history of charter schools in North Carolina, no relationship whatsoever has existed between the private corporations who operate charter schools and county boards of commissioners – either by statute or in practice. Now Plaintiffs are asking this Court to judicially create such a relationship whereby a county would, for the first time, be permitted to appropriate money to a private corporation and to do so in direct contravention of the General Assembly’s clearly expressed intent that such corporations not be eligible to receive capital funding.

¹ In this brief, as in the State’s original brief in support of its Motion to Dismiss, the State has used the phrase “Uniform System” to refer to the uniform system of public schools mandated under Article IX, Section 2(1) and the phrase “Uniform Public Schools” to refer to the traditional public schools that operate within that Uniform System.

While an elaborate process exists for a local school board to obtain funding from its county, *see* N.C. GEN. STAT. §§ 115C-429; 115C-431, there is no provision of the North Carolina General Statutes authorizing a county board of commissioners to allocate any county monies directly to the corporations that operate charter schools, whether for capital funding or otherwise. Indeed, there is no statutory interaction at all provided for between counties and those corporations. Rather, capital funding requests for the Uniform Public Schools in that district are made to the county board of commissioners through the above-referenced statutory budgeting process by the local school board – whose members are publicly elected and accountable to the local taxpayers.

Yet, in this lawsuit, Plaintiffs demand that this Court either require the General Assembly to (1) Amend the Charter School Statutes so as to create a statutory mechanism for the private corporations who operate charter schools to directly request and receive capital funding directly from counties; or (2) Reverse well established jurisprudence from the North Carolina Supreme Court prohibiting counties from appropriating funds absent clear statutory authorization to do so and rule instead that counties have some nebulous “inherent right” to make such appropriations (a right that has never before been recognized by a North Carolina court). Plaintiffs are simply not entitled to such relief.

In one breath, Plaintiffs profess adherence to the well established principle that courts must give effect to statutes that are clear and unambiguous and must strive to carry out the Legislature’s intent. (Pls.’ Br. at 9, 26) However, they then proceed to ask this Court to ignore the fact that the specific statute addressing funding for charter schools *does not authorize capital funding*. *See* N.C. GEN. STAT. § 115C-238.29H.

Some questions of statutory interpretation are complex; this one, conversely, is simple. The funding statute for *Uniform Public Schools* lists three sources of funding: (1) The State Public School Fund; (2) The local current expense fund; and (3) The capital outlay fund. N.C. GEN. STAT. § 115C-426(c)(1)-(3). Conversely, the funding statute for *charter schools* lists only the first two sources and not the third. N.C. GEN. STAT. § 115C-238.29H(a)-(b). Moreover, N.C. GEN. STAT. § 115C-238.29D(c) reinforces this notion by making clear that the *charter school* – not the State, the local school board, or the county – is responsible for obtaining space. Because the intent of the General Assembly could not be clearer, it is difficult to imagine a more straightforward case of statutory construction.

B. PLAINTIFFS' STATUTORY INTERPRETATION ARGUMENTS ARE INCONSISTENT WITH APPLICABLE CASE LAW FROM NORTH CAROLINA'S APPELLATE COURTS.

A ruling that charter schools are eligible to receive capital funding from counties would be flatly inconsistent with *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979). As discussed in the State's original brief, *Hughey* is the leading case in North Carolina establishing the inability of counties to allocate money for a purpose not expressly authorized by the General Assembly.

Plaintiffs attempt, in vain, to cobble together an argument as to why they believe some authority exists for counties to provide such funding. Plaintiffs cite N.C. GEN. STAT. § 115C-408(b) for the broad policy statement that counties are responsible for meeting the facilities requirements for the public education system. Obviously, however, this general policy declaration is subject to the terms of the specific funding statutes that follow, detailing precisely how such funding is to occur.

As noted above, North Carolina General Statute Section 115C-426 – the funding statute for the Uniform System – specifically directs counties to provide capital funding for the benefit of the Uniform Public Schools. N.C. GEN. STAT. § 115C-426(f). As such, this statute provides the statutory authorization required under *Hughey* for counties to make such capital appropriations to local school boards. However, no comparable statutory authorization exists for counties to appropriate money directly to charter schools.²

Plaintiffs' reliance on Article IX, Section 7(a) of the Constitution, which states that money belonging to a county school fund should be used exclusively for public schools, is also mistaken. This provision simply means that counties are not free to use such funds for purposes unrelated to education. *See Cauble v. City of Asheville*, 66 N.C. App. 537, 544, 311 S.E.2d 889, 894 (1984) (“We are equally cognizant of the manifest purpose of the framers of the Constitution in enacting Article IX, § 7, that is, to set aside property and revenue to support the public school system and to prevent the diversion of such property and revenue to other purposes.”), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985) (emphasis added).

Moreover, Plaintiffs' argument is foreclosed by *Hughey*, which makes clear that counties – in providing educational funding – are *not* free to fund projects on their own initiative. “It is well established that the role of the board of county commissioners in the funding of the school budget is not to interfere with the general control of the schools vested in the board of education.” *Hughey*,

² Plaintiffs misunderstand the meaning of N.C. GEN. STAT. § 115C-238.29H(a1), which provides that a charter school “may own land and buildings it obtains through non-State funds.” What this provision means is that charter schools may, if they desire, use some portion of the second source of funding they receive (per pupil local current expense funds) to buy land or other facilities. However, this does *not* mean that they suddenly become eligible to receive a third category of funding – capital funding.

297 N.C. at 94, 253 S.E.2d at 903. The Supreme Court went on to make clear that counties are empowered to appropriate money only for those items that are included by the school board in its annual budget. *Id.* In making a contrary argument, Plaintiffs are trying to reargue *Hughey*.

Furthermore, the Court of Appeals has noted that Article IX, Section 7 “is not self-executing and that it consequently requires legislation to give it effect and a means for its enforcement.” *N.C. Sch. Bds. Ass’n v. Moore*, 160 N.C. App. 253, 265, 585 S.E.2d 418, 426 (2003), *aff’d in part, rev’d in part on other grounds*, 359 N.C. 474, 614 S.E.2d 504 (2005). With regard to Uniform Public Schools, the General Assembly has provided such clarifying legislation by enacting N.C. GEN. STAT. § 115C-426. With regard to charter schools, it is N.C. GEN. STAT. § 115C-238.29H that spells out what types of local money charter schools are – and are not – permitted to receive.

Plaintiffs’ attempt to rely on the decisions in *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 655 S.E.2d 850 (2008) (hereafter “*Sugar Creek I*”), *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, ___ N.C. App. ___, 673 S.E.2d 667 (2009) (hereafter “*Sugar Creek II*”), and *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 563 S.E.2d 92 (2002), fares no better.

In *Sugar Creek I*, the issue before the court was how the local per pupil funding available to the plaintiff corporations operating charter schools should be calculated and how certain money should be apportioned between the defendant school board and the plaintiff corporations. *Sugar Creek I*, 188 N.C. App. at 455-57, 655 S.E.2d at 852-53. Nothing in *Sugar Creek I* supports the proposition that charter schools are eligible to receive capital funding. Indeed, to the contrary, *Sugar Creek I* actually undermines Plaintiffs’ position. In its decision, the Court of Appeals made clear that, pursuant to N.C. GEN. STAT. § 115C-238.29H, charter schools are only entitled to money from

the local current expense fund (the second of the two funding sources allowed for charter schools in N.C. GEN. STAT. § 115C-238.29H) that is given to local school boards and *not* from the capital outlay fund. *Id.* at 461-62, 655 S.E.2d at 855.³

Nor does the decision in *Francine Delany* advance Plaintiffs' argument. That case dealt with the question of how revenues received from fines and forfeitures and from supplemental school taxes should affect the per pupil local current expense appropriation under N.C. GEN. STAT. § 115C-238.29H. 150 N.C. App. at 339, 563 S.E.2d at 93.

Plaintiffs take out of context the statement in *Francine Delany* that the General Assembly intended for charter schools to be treated as public schools subject to the uniform budget format. *Id.* at 346, 563 S.E.2d at 97. Plaintiffs ignore the fact that the court made this statement to support its conclusion that "supplemental taxes as well as penal fines and forfeitures be included in the operating budget of the school – *the local expense fund.*" *Id.* (emphasis added) The question of whether corporations operating charter schools are eligible for capital funding was not even remotely at issue in *Francine Delany*. As such, that case has no relevance here. The reference in *Francine Delany* to charter schools being subject to the uniform budget format simply means that local school boards are directed to keep financial records in a statutorily prescribed manner and that these records are utilized in determining the per pupil expenditure that the corporations operating charter schools are entitled to receive. *See* N.C. GEN. STAT. § 115C-426(a); N.C. GEN. STAT. § 115C-238.29H(b).

For these reasons, the statutory interpretation arguments contained in Plaintiffs' brief are meritless.

³ *Sugar Creek II* likewise concerned a dispute over whether the plaintiff corporations were receiving the correct amount of per pupil expenditures from the defendant school board.

III. THE GENERAL ASSEMBLY HAS THE CONSTITUTIONAL AUTHORITY TO MAKE CHARTER SCHOOLS INELIGIBLE TO RECEIVE CAPITAL FUNDING.

A. ENACTMENTS OF THE GENERAL ASSEMBLY ARE PRESUMED TO BE CONSTITUTIONAL.

The State fully agrees with Plaintiffs that the judiciary of this State is charged with the power to determine whether statutes violate the Constitution. However, it is axiomatic that, in so doing, courts must resolve all doubts in favor of the constitutionality of a legislative act. *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Housing Bonds, etc.*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). Similarly, “[a] statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground.” *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993).

Plaintiffs then make the puzzling statement that even if this Court were inclined to pay deference to a legislative act, no act of the General Assembly is at issue here as to which such deference should be paid. (Pls.’ Br. at 8) However, as discussed in the preceding section of this brief, the General Assembly enacted N.C. GEN. STAT. § 115C-238.29H as the exclusive statute governing the types of funding available for charter schools and consciously elected not to include capital funding. It is this legislative policy decision to which deference should be given.

B. NOTHING IN THE NORTH CAROLINA CONSTITUTION PROHIBITS THE GENERAL ASSEMBLY FROM GIVING LIMITED PUBLIC FUNDING TO CORPORATIONS OPERATING EXPERIMENTAL SCHOOLS THAT ARE OUTSIDE THE UNIFORM SYSTEM.

The most fundamental flaw in the constitutional analysis contained in Plaintiffs’ brief is the inaccuracy of their basic premise – a premise that permeates their entire argument – that schools

receiving public funding cannot exist outside the constitutionally mandated Uniform System. Plaintiffs' argument hinges on their mistaken belief that the powers of the General Assembly are limited in the same way that Congress' powers are limited – such that the General Assembly cannot pass a law unless the subject of the law is explicitly spelled out in the Constitution as a permissible basis for legislation. In making this assertion, Plaintiffs have it exactly backwards.

Unlike the federal Constitution, which is a grant of power to Congress, the . . . [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. *Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.* Further, [i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. . . . Consequently, *the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.* In other words, the doctrine of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another thing) is inapplicable.

Baker v. Martin, 330 N.C. 331, 338, 410 S.E.2d 887, 891 (1991) (citation and quotation marks omitted and emphasis added).

Thus, while Plaintiffs' brief characterizes the State's position on this issue as "odd and novel" (Pls.' Br. at 29), there is nothing odd or novel about it. To the contrary, it simply restates what the above-quoted language from our Supreme Court in *Baker v. Martin* makes clear – namely, that the General Assembly has the authority to pass laws on any subject unless expressly forbidden from doing so in the Constitution.

Contrary to Plaintiffs' assertions, the State is *not* suggesting that the General Assembly is free to ignore limitations set out in the Constitution. Rather, the State is making the altogether separate argument that because nothing in the Constitution prohibits the General Assembly from (1) authorizing the appropriation of public funds to private corporations operating a school; or (2)

choosing to have those schools operate outside of the Uniform System, the General Assembly is free to take such action.

It is undisputed that the General Assembly has a constitutional obligation to establish a Uniform System pursuant to Article IX, Section 2(1) of the Constitution. Plaintiffs do not – and could not – take issue with the fact that the General Assembly has satisfied this obligation. What Plaintiffs fail to comprehend is that having fulfilled that obligation to provide a set of Uniform Public Schools that every child is entitled to attend, nothing in the Constitution prohibits the General Assembly from proceeding to authorize a group of separate, and purely optional, alternative schools receiving public funding that are intended to be an experimental alternative to the Uniform System. This is precisely what the General Assembly has done in authorizing not only charter schools but also the other experimental schools listed on p. 21 of the State’s original brief.

In arguing that the Constitution “authorizes and contemplates [only] a single category of State schools,” (Pls. Br. at 12), Plaintiffs are relying on illusory language that is nowhere in the actual Constitution. As long as the General Assembly fulfills its constitutional duty to create a Uniform System (which it clearly has done), it is free to also authorize a parallel non-uniform group of purely experimental schools governed by a different set of operational and funding requirements.

C. CHARTER SCHOOLS ARE NOT PART OF THE UNIFORM SYSTEM.

Plaintiffs’ failure to grasp the purely voluntary nature of charter schools is perhaps nowhere better exemplified than on p. 14 of their brief in which Plaintiffs suggest that the Constitution does not “permit[] the State to place students into separate classes of public school students . . .” (Pls. Br. at 14) In reality, the State does not “place” any student into a charter school. Rather, students (with

their parents' consent) place themselves into charter schools – doing so with full knowledge about the benefits charter schools do and do not receive.

While Plaintiffs claim the fact that the Charter School Statutes are codified in Chapter 115C somehow makes charter schools part of the Uniform System, this argument is illogical. Church schools, nonsectarian private schools, and home schools are likewise codified in Chapter 115C. *See* N.C. GEN. STAT. § 115C-547 *et seq.*; N.C. GEN. STAT. § 115C-555 *et seq.*; N.C. GEN. STAT. § 115C-563 *et seq.* Obviously, they are not part of the Uniform System. In fact, they are not even public.

The statement in Plaintiffs' brief that Uniform Public Schools and charter schools are "constitutionally indistinguishable" (Pls. Br. at 19) is simply wrong. The former are constitutionally mandated while the latter were not even in existence – much less required – at the time the Constitution was enacted.

Our Supreme Court has made clear that the Uniform System must (1) be subject to the same rules and regulations in each locality of the State; (2) exist in all areas of the State; (3) be available to all of the school population; and (4) be under the control and regulation of the public school authorities. *See Bd. of Educ. v. Bd. of Comm'rs*, 174 N.C. 469, 473, 93 SE 1001, 1002 (1917); *Lane v. Stanly*, 65 N.C. 153, 157-58 (1871).

Charter schools do not meet any — much less all — of these criteria. First, rather than there being a uniform set of rules for Uniform Public Schools and charter schools alike, the private board of directors operating each charter school has the discretion to establish its own set of regulations. Second, there is no requirement in the Charter School Statutes that charter schools exist everywhere in North Carolina and, in fact, numerical limits exist on the allowable number of charter schools. Third, it is physically impossible for all but a fraction of the school age children in North Carolina

to actually attend a charter school. Fourth, as discussed below, the State (and local school boards) have only minimal control over charter schools. Fundamental control is instead exercised by a private board of directors. Given that charter schools meet *none* of the characteristics of the Uniform System as articulated by our Supreme Court, it is unclear how Plaintiffs can argue that they are, nevertheless, part of the Uniform System.

Plaintiffs devote a great deal of space arguing the proposition that charter schools are classified as public schools. Their reason for doing so is unclear as none of the Defendants in this action dispute this. However, Plaintiffs distort the meaning and significance of this classification.

What Plaintiffs fail to grasp is that a school can be deemed “public” yet still operate outside the Uniform System. Charter schools are classified as public schools only because they receive public funds through the issuance of the charter. If the charter is revoked, or not renewed, and the corporation running the school decides to continue the school’s operation (funded solely by private funds), the school ceases to be a public school and instead functions from that point onward as a private school.

Furthermore, the State cannot shut down a charter school any more than it can shut down a private school. Instead, the State can only revoke the school’s charter. It is only the existence of an operational charter (and the public funding provided pursuant to that charter) that allows a charter school to be classified as a “public school.”

Plaintiffs’ assertions that “the State controls the manner and method of a . . . charter school’s . . . operation” and “controls the instructional program of a . . . charter school” (Pls. Br. at 10) is demonstrably false. To the contrary, the Charter School Statutes expressly state that “[except as provided in this Part and pursuant to the provisions of its charter, a charter school is exempt from

statutes and rules applicable to a local board of education or local school administrative unit.” N.C. GEN. STAT. § 115C-238.29E(f) (emphasis added). Thus, in reality, a charter school is governed by the board of directors of the private corporation that receives the charter. See N.C. GEN. STAT. § 115C-238.29E(d) (“The board of directors of the charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures.”).

It is this private board of directors – *not the State or a local school board* – that controls: (1) the school’s curriculum; (2) the school’s budgetary decisions; (3) the instructional materials the school uses; (4) the manner in which the school’s employees are hired and fired (as well as the terms of their employment); (5) the activities taking place in the classroom during school hours; (6) the code of conduct for the school’s students; (7) the specific location of the school within the county that is listed on the charter application; (8) the number of hours per day that school is in session; and (9) the manner in which the school’s supplies are purchased.

It is difficult to conceive of aspects of a school’s operation more fundamental than those set out in the preceding paragraph. Yet control over *each* of these areas is vested with the school’s private board of directors rather than with the State or a local school board.⁴

The clearest indication of the General Assembly’s intent on this issue is found at the beginning of the Charter School Statutes:

The purpose of [the Charter School Statutes] is to authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate *independently of existing schools . . .*

⁴ Plaintiffs further ignore the fact that (1) the acts and omissions of a charter school cannot subject the State Board of Education or its employees to civil liability; and (2) debts incurred by a charter school are not deemed to be debts of the State or its political subdivisions. These provisions would make no sense if charter schools were part of the Uniform System.

N.C. GEN. STAT. § 115C-238.29A (emphasis added). Notably, this provision does not state that charter schools are to operate as a part of – or even in conjunction with – Uniform Public Schools. Instead, the General Assembly used language unmistakably conveying the notion that charter schools are to exist independently of – and, therefore, as an alternative to – the Uniform Public Schools.

In their brief, Plaintiffs confuse the concept of charter schools being outside of the Uniform System (which is true) with the entirely separate concept of *students* being “outside of the *Constitution*” (which is false). Plaintiffs’ assertion that charter schools are being denied constitutional protection reflects a misunderstanding of what it means to be a charter school. A charter school is not a legal entity. Rather, the Charter School Statutes make clear that the only legal entity capable of suing and being sued is the board of directors of the corporation operating the school. *See* N.C. GEN. STAT. § 115C-238.29F(c)(1).

Thus, every time Plaintiffs’ brief talks about the “rights” of charter schools, what they are really talking about are the “rights” of a private corporation. It need hardly be said that these private entities do not have a constitutional right to receive *any* public money – much less capital funding to purchase a building. Rather, the only legal rights they have are grounded not in constitutional principles but rather in licensure terms as the recipient of a license – that is, a right under the terms of the charter they have been issued to receive some limited public funding subject to their compliance with the terms of their charter and with the Charter School Statutes.

With regard to the constitutional rights of those students who choose to attend charter schools, those students (like every other child of school attendance age in North Carolina) have the right to attend a Uniform Public School established under Article IX, Section 2(1) of the Constitution and, by exercising that right, the child can attend a school that is part of the Uniform System,

receives public capital funding, and is subject to the myriad of regulations set out in Chapter 115C of the North Carolina General Statutes.

Those students, however, are also free to waive that right and instead seek enrollment in an optional school constituting an alternative to the Uniform System such as a charter school, a private school, a home-school, or one of the other special public schools listed on p. 21 of the State's original brief. Charter school students have chosen to forego their right to attend a Uniform Public School and have instead opted to attend a school offering the educational opportunities provided by the private corporation running that school. Such students have no constitutional right to demand that their school of choice offer them the same benefits they elected to forego by not attending the Uniform Public School available to them. Thus, it is both inaccurate and insulting for Plaintiffs to distort the State's argument into a contention that "charter school students . . . are not eligible for Constitutional protection . . ." (Pls. Br. at 8).

While Plaintiffs' brief argues that different "classes" cannot exist within the Uniform System, this principle has no relevance here. Charter schools are not a "class" or "subset" within the Uniform System. Rather, they are a group of schools that, to use the language of the Charter School Statutes, "operate independently of" the Uniform Public Schools. See N.C. GEN. STAT. § 115C-238.29A.

Plaintiffs attempt to rely on *City of Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890), *Board of Graded School Comm'rs v. Board of Educ.*, 163 N.C. 404, 79 S.E. 886 (1913), and *Mebane Graded School Dist. v. Alamance County*, 211 N.C. 213, 189 S.E. 873 (1937), but none of these cases support their argument. Those cases involved disputes concerning the funding of city school systems and county school systems – both of which had been set up by the Legislature to discharge the constitutional mandate to provide a uniform school system within North Carolina. There was no

such thing at the time those cases were decided as an alternative public school option (as charter schools are today), and each of these cases addressed systems containing schools to which students were assigned (unlike charter schools). As such, those cases are inapposite to the present case.

The remaining arguments Plaintiffs make similarly fail to overcome the deficiencies inherent in their Amended Complaint. They cite N.C. GEN. STAT. § 115C-238.29E(a) for the proposition that a charter school approved by the State shall be a public school within the local school administrative unit in which it is located. However, they fail to cite the language that follows in that statutory subsection making clear that charter schools are accountable to the State (or, if they choose, to their local school board) *only for purposes of ensuring compliance with the terms of their charters and ensuring compliance with the Charter School Statutes*. Thus, unlike the Uniform Public Schools existing within that same school district, charter schools are exempt from the remaining hundreds of statutes set out in Chapter 115C.

Plaintiffs' attempt to rely on an informal Attorney General's Office opinion stating that charter schools are required to offer 180 days of instruction per year does not even remotely advance their cause. While Plaintiffs purport to cite this opinion in support of their argument that charter schools are within the same constitutional class as Uniform Public Schools, it is difficult to understand their logic as the opinion expressly states that it is based on the express statutory requirement in N.C. GEN. STAT. § 115C-238.29F(d)(1) mandating a 180-day school year for charter schools. *See* 1999 N.C. A.G. LEXIS 10, *6 (March 15, 1999) ("In conclusion, despite the greater flexibility given to charter schools in general, they must abide by the clear statutory obligations in the Charter Schools Act. One of those clear obligations is to provide at least 180 days of

instruction.”). Thus, the fact that charter schools are bound to comply with the provisions of the Charter School Statutes does not even remotely support Plaintiffs’ argument.⁵

D. THE LOGICAL EXTENSION OF PLAINTIFFS’ POSITION IN THIS CASE IS THAT CHARTER SCHOOLS SHOULD BE SUBJECT TO ALL OF THE PROVISIONS OF CHAPTER 115C.

In their brief, Plaintiffs never come to terms with the paradox contained in their argument: They seek to remain free to operate in a radically different manner than Uniform Public Schools in every material respect yet, at the same time, be given the right to demand equal access to capital funding – simply because Uniform Public Schools receive such funding. This makes no sense. As noted earlier in this brief, if charter schools truly were part of the Uniform System, principles of “uniformity” would require them to be subject to the same rules and regulations as other Uniform Public Schools. Indeed, while they cite *Lane v. Stanley*, 65 N.C. 153 (1871), and other cases setting out the requirements of uniformity, they ignore the fact that charter schools meet none of these criteria. They cannot have it both ways; either they are part of the Uniform System or they are not. And for all of the reasons set out herein and in the State’s original brief, they simply are not.

In their brief, Plaintiffs make a halfhearted attempt to argue that principles of uniformity allow for some flexibility for “management or operation nuances” regarding the operation of schools. (Pls. Br. at 19) However, the ability to be governed in every material respect by a private corporation cannot be characterized as a “management or operation nuance.” Rather, it is the outright relinquishment of control over the core functioning of a school to a private entity.

⁵ Notably, while charter schools are required to have a 180-day school year, the school’s governing board of directors has complete discretion as to how many hours a day the school will be in session.

E. CHARTER SCHOOLS ARE MERELY ONE OF SEVERAL EXAMPLES OF EXPERIMENTAL PUBLIC SCHOOLS AUTHORIZED BY THE GENERAL ASSEMBLY THAT ARE NOT PART OF THE UNIFORM SYSTEM.

Charter schools are merely one of the optional public schools authorized by the General Assembly. Others include the North Carolina School of Science and Mathematics (hereafter “School of Science and Math”), the North Carolina School of the Arts (hereafter “School of the Arts”), the State School for Sight Impaired Children, and the State School for Hearing-Impaired Children. In their brief, Plaintiffs not only make no attempt to distinguish charter schools from these other special schools but, to the contrary, argue that all of these schools “stand or fall together . . .” (Pl’s. Br. at 15) Thus, Plaintiffs are claiming that *any* school that receives any measure of public funding – no matter how unlike the Uniform Public Schools in purpose, design, and operation that school may be – is part of the Uniform System.

This assertion aptly demonstrates the invalidity of Plaintiffs’ position. It is illustrative to consider, for example, the School of the Arts, which is statutorily established to serve “[t]he primary purpose of . . . professional training . . . of music, drama, the dance, and allied performing arts . . .” N.C. GEN. STAT. § 116-69. Moreover, the school was set up to include in its student body not only North Carolina residents but also “students . . . [from] other states, particularly other states of the South.” N.C. GEN. STAT. § 116-64. In addition, its enabling statute further states that it is a part of the University of North Carolina. N.C. GEN. STAT. § 116-65.

The enormous differences between the School of the Arts and the Uniform Public Schools are obvious, and, for this reason, it cannot rationally be said that this school is part of the Uniform System. Yet, this is precisely what Plaintiffs are arguing. By their logic, the School of the Arts has a constitutional entitlement to the identical funding that any Uniform Public School in North

Carolina receives and vice-versa. However, the notion that the School of the Arts (or any of the other special schools listed above) is constitutionally entitled to be eligible for capital funding from the county in which it is located is ludicrous; counties have no control over, or relationship with, such schools. The same is true with regard to charter schools. Plaintiffs' argument that all public schools must receive identical categories of funding – if accepted by this Court – would throw North Carolina's system of school funding into chaos.

IV. PLAINTIFFS' EQUAL PROTECTION RIGHTS HAVE NOT BEEN VIOLATED.

Finally, Plaintiffs claim the ineligibility of charter schools to receive capital funding violates their equal protection rights. This claim is also meritless for several reasons.

First, our Supreme Court has held that the equal protection clause simply requires that those who are similarly situated be treated equally. *Maines v. City of Greensboro*, 300 N.C. 126, 132, 265 S.E.2d 155, 159 (1980). Here, Plaintiffs do not – and could not – assert that some charter schools are deemed eligible for capital funding while others are not. Rather, every charter school in North Carolina is funded equally. Moreover, for all of the reasons set out herein and in the State's original brief, charter schools and Uniform Public Schools are not similarly situated. Thus, equal protection concerns are not implicated.

Second, Plaintiffs' equal protection claim also fails because sound reasons exist for the legislative policy decision to make charter schools ineligible to receive capital funding. As Plaintiffs' brief concedes, a legislative classification does not violate the equal protection clause where the classification is "founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation." Pls.' Br. at 39 (quoting *In Re Appeal of Martin*, 286 N.C. 66, 76, 209 S.E.2d 766, 773 (1974)).

As noted in the State's original brief, among the eminently logical bases for the General Assembly's decision that charter schools cannot receive capital funding are (1) the fact that charter schools are governed by private entities; (2) the negative effect on the capital funding needs of Uniform Public Schools that would occur if counties could allocate their limited capital funding resources on charter schools; (3) the fact that counties lack any relationship with, or control over, charter schools; and (4) the lack of permanency surrounding charter schools. Thus, a reasoned basis clearly exists for the General Assembly's decision.

Third, the Court of Appeals has previously rejected an analogous equal protection argument in *Banks v. County of Buncombe*, 128 N.C. App. 214, 494 S.E.2d 791, *aff'd*, 348 N.C. 687, 500 S.E.2d 666 (1998). *Banks* involved a challenge to a county's method of allocating funds to the two school districts contained therein. Among the plaintiffs' claims was an assertion that their equal protection rights had been violated by the county's distribution of residual sales tax revenue to local schools on an ad valorem – as opposed to on an average daily membership – basis. The plaintiffs argued that as a result students in one part of the county received superior resources than those received by students in a different portion of the county. The court rejected this argument, holding that such a funding discrepancy did not amount to an equal protection violation. *Id.* at 222-24, 494 S.E.2d at 796-97.

The same logic applies even more so here. *Banks* shows that even discrepancies in funding *between schools that all part of the Uniform School System* do not violate the equal protection clause. Thus, it is even more elementary that differences in the funding mechanisms between Uniform Public Schools and charter schools likewise comport with equal protection principles.

Plaintiffs also cite *Leandro v. State*, 346 N.C. 336, 488 S.E 2d 249 (1997) but that case does not help them either. The Supreme Court in *Leandro* made unambiguously clear that its focus was on ensuring that all children in North Carolina have *access* to a sound basic education. *See id.* at 353, 488 S.E 2d at 258 (emphasis added) (“[W]e conclude that the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with *access* to a sound basic education . . .”) (emphasis added).

Plaintiffs do not challenge the fact that every charter school student has full and unfettered access to attend a Uniform Public School – one that receives capital funding and is in all respects compliant with *Leandro*. Indeed, *Leandro* actually hurts Plaintiff’s case as the Supreme Court made clear that the conferral upon students in Article IX, Section 2(1) of a right to equal opportunity for an education did *not* require “substantially equal funding or educational advantages in all school districts.” *Id.* at 349, 488 S.E.2d at 256. *See id.* (“[W]e conclude that provisions of the current state system for funding schools which . . . result in unequal funding . . .do not violate constitutional principles.”). The Court further emphasized that the Constitution did not require equal educational opportunities in all of the State’s school districts. *Id.* at 351, 488 S.E.2d at 257.

The only type of funding discrepancy the *Leandro* Court viewed as potentially unconstitutional was “a funding system that distributed state funds to the districts in an arbitrary and capricious manner” that was unrelated to the objective of providing additional public funds to poor school districts. *Id.* at 353, 488 S.E.2d at 258. As shown above, Plaintiffs cannot come close to meeting the arbitrary and capricious standard here.

CONCLUSION

For the reasons set out herein, Plaintiffs' claims in this action lack merit. The State respectfully requests that its Motion to Dismiss be granted and that this action be dismissed.

Respectfully submitted, this the 29th day of April, 2010.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **REPLY BRIEF IN SUPPORT OF THE STATE'S MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

- Hand-delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via electronic mail; or
- Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

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This the 29th day of April, 2010.



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